Nos. 471 and 649 Consolidated

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner and Cross-Respondent

vs.

WILLIE PEACOCK, ET AL.
Respondents and Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

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INDEX

CITATIONS

Cases

Constitution, Statutes and Ordinances

Text Books

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BRIEF FOR PETITIONER

OPINIONS BELOW

The causes styled in the Court below "Willie Peacock et al, vs. The City of Greenwood, Mississippi" and "Dorothy Weathers et al. vs. The City of Greenwood, Mississippi" were consolidated in this Court.

1. The opinions of the United States District Judge of the Greenville Division of the Northern District of Mississippi in these cases are not officially reported, but these opinions appear in the record herein as follows:

(a) Opinion in the Peacock case (R. 8).

(b) Opinion in fourteen of the cases consolidated with others in the Court of Appeals as The City of Greenwood, Mississippi, vs. Dorothy Weathers, et al. (R-70)

(c) An order amending the above opinion (R. 87).

(d) The District Court's finely reasoned opinion in City of Clarksdale, Mississippi, vs. Marie Gertge, a copy of which was attached to and made a part of the opinion at R. 70 and which was referred to in the other opinions set forth below as controlling those cases. (R. 72)

(e) Opinions in other cases later consolidated in the Court of Appeals as The City of Greenwood, Mississippi, vs. Dorothy Weathers, et al. (R. 89, 92, 94)

2. The opinion of the United States Court of Appeals for the Fifth Circuit in the Peacock case is reported at 347 F. 2d 679 and its summary reversal of the Weathers case is reported at 347 F. 2d 986. These opinions appear in the record herein at pages 21 and 96, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in the Peacock case was dated and entered June 22, 1965 (R. 33) and in the Weathers case was dated and entered July 20, 1965 (R. 96).

Order of Hon. Byron R. White, Associate Justice of the Supreme Court of the United States, dated July 23, 1965, was entered on that date extending the time for petitioner to file a petition for writ of certiorari to and including August 21, 1965. (R. 34) The petition for certiorari was filed within said time and was granted by an order of this Court dated January 17, 1966 (R. 35).

Order of Hon. Hugo L. Black, Associate Justice of the Supreme Court of the United States, dated September 20, 1965, extending the time for filing by Willie Peacock et al, of a cross-petition for writ of certiorari to and including October 5, 1965 (R. 97), and the order of this Court granting certiorari on said petition was entered January 17, 1966. (R. 97)

The jurisdiction of this Court to review each of said judgments is conferred by 28 USC section 1254 (1). The judgments to be reviewed (R. 33 and 96) were rendered by the United States Court of Appeals for the Fifth Circuit reversing the judgments of the United States District Court for the Northern District of Mississippi remanding these criminal prosecutions to the Police Court of the City of Greenwood, Mississippi, from which they had been removed to said District Court under the purported authority of 28 USC section 1443. The judgments of said Court of Appeals to be reviewed remanded these cases to the United States District Court with directions to have a hearing on the truth of the allegations of the removal petitions. (R. 33 and 96)

STATUTES AND ORDINANCES WHICH THESE CASES INVOLVE

1. 28 U.S.C. Section 1443, which is as follows:

CIVIL RIGHTS CASES.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

2. 28 U.S.C. Section 1446(a) which is as follows:

PROCEDURE FOR REMOVAL

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

3. The following sections of Mississippi Code Annotated of 1942, all of which are set forth in Appendix I, to-wit: 2089.5; 2291; 2296.5; 7185-13; 8576; 9352-21; and 9352-24.

4. The ordinance of the City of Greenwood, Leflore County, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Record of Ordinances of the said City, which appears in Appendix I hereto.

5. Revised Statutes. Title XIII, The Judiciary, sec. 641.

The above ordinance of the City of Greenwood, and statutes of the State of Mississippi, and Sec. 641 of Revised Statutes are lengthy and for that reason are set out in Appendix 1 as authorized by Rule 40 1 (c) of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in reversing the District Court's holding that Respondents' petitions

for removal did not state a removable cause within the meaning of 28 U.S.C. 1443(1), and in remanding the causes to the District Court for an evidentiary hearing on the truth of Respondents' allegations in the petitions for removal.

2. Whether the petitions for removal alleged sufficient facts under 28 U.S.C. Sec. 1446(a) upon which to base removal jurisdiction under 28 U.S.C. Sec. 1443.

3. Whether the Court of Appeals erred in applying its notice type pleading rule to the allegations of the removal petitions herein, including the allegations necessary to show the jurisdiction of the United States District Court.

4. Whether the Court of Appeals erred in holding that a good claim for removal under 28 U.S.C. 1443(1) is stated by allegations that state statutes and municipal ordinances have been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrests and charges under the statutes and ordinances were effected for reasons of racial discrimination.

5. Whether the Court of Appeals erred in holding that the alleged violation of Respondents' rights under the equal protection clause of the Fourteenth Amendment by the acts of state officials in arresting and charging Respondents with violations of state criminal statutes and municipal ordinances which are not violative on their faces of said equal protection clause, entitled Respondents to remove said state prosecutions to Federal court under 28 U.S.C. Sec. 1443(1).

STATEMENT OF THE CASE

The 14 Respondents in the Peacock case filed in the United States District Court identical petitions to remove to that Court criminal prosecutions pending against them in the Police Court of the City of Greenwood, Mississippi. All of these petitions were verified by Respondent's at-

torney and all were filed in the District Court in one jacket file under one docket number as a matter of convenience and economy to the petitioners. (R. 3 and 8) In their designation of the record in the Court of Appeals, the Respondents only designated to be printed "a single petition for removal (all petitions being the same)". (R. 1) The single petition so printed is that of Willie Peacock. (R. 3)

The petition alleges that on March 31, 1964, Respondent was arrested in Greenwood, Mississippi, and subsequently charged with the violation of Mississippi Code section 2296.5 (see appendix 1) by obstructing public streets and is to be tried on said charge in the City Court, Greenwood, Mississippi, on April 3, 1964. The only other factual allegations in the petition are that Respondent "is a member of the Student Non-Violent Coordinating Committee affiliated with the Conference of Federated Organizations, both Civil Rights Groups, and was at the time of the arrest engaged in a Voter Registration drive in Leflore County, Mississippi, assisting negroes to register so as to enable them to vote as protected under the Federal Constitution and the Civil Rights Act of 1960, being 42 USCA 1971, et seq."

As conclusions, the petition alleged substantially the following: That Respondent cannot enforce his rights under the first and fourteenth amendments to the Federal Constitution to be free in speech, to petition and to assemble; is denied the equal protection, privileges and immunities, and due process "of the Laws", inasmuch as among other things "was arrested, charged and is to be tried under a state statute that is vague, indefinite and unconstitutional on its face; is unconstitutionally and arbitrarily applied and used, and is enforced in this instance as a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood"; and "because of the above" "is

thereby denied and/or cannot enforce in the Courts of the State of Mississippi" the equal rights of citizens under the Federal Constitution and 42 USCA 1971.

As we understand the petition, it assigns the fact that he was arrested, charged and is to be tried under the above mentioned state statute as the reason for the conclusion that Respondent is denied and cannot enforce in the State Courts the rights he possesses providing for the equal rights of citizens. The statute in question simply makes it unlawful for any person to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, road, etc., by impeding, hindering, stifling, retarding or restraining traffic or passage thereon (Appendix 1); and on its face it applies to all person alike.

The Respondents amended the 14 petitions so as to correctly style the case as a criminal action and to substitute the name 'Student Non-Violent Coordinating Committee' for the name 'Congress of Racial Equality' in the second paragraph of the petition. (R. 7 and 8)

Petitioner filed a motion to remand the cause to the Police Court of the City of Greenwood on the ground that the cause was removed improvidently and that the petitions for removal show on their faces that the District Court is without jurisdiction. (R. 5) By opinion (R. 8) and order (R. 17) the District Court without hearing any testimony remanded the cause to said Police Court and ordered the defendants to surrender themselves to the Chief of Police of Greenwood.

The Respondents filed notice of appeal to the United States Court of Appeals for the Fifth Circuit (R. 18), obtained a stay of the remand pending appeal from the remand order (R. 19).

The Court of Appeals rendered an opinion (R. 21) and judgment (R. 33) affirming the order of the District Court insofar as it held that the cases were not remova-

ble under subsection 2 of 28 USC 1443, but reversing the order of the District Court holding that on the face of the petitions the cases were not removable under subsection 1 of the statute and remanding the case to the District Court for a hearing on the truth of the allegations of the petitions.

The Weathers case also involves criminal cases removed from the Police Court of the City of Greenwood, Mississippi, to the United States District Court under the claimed authority of 28 USC section 1443. In that case there are fifteen Respondents, some of whom are charged with more than one offense, and who filed in the District Court a total of 18 removal petitions. The petitions were filed on mimeographed forms and, according to the agreement in the record (R. 98), are identical except for the names of the defendants, the amounts of the bail bonds, the dates set for trial in Police Court, the names of the attorneys, the offenses for which Respondents were arrested, and certain other minor particulars. For that reason, by agreement (R. 98) one petition is printed in the record (R. 36) and as to each other petition (R. 47 through R. 63) there are only printed paragraphs A-2 and B-1 so as to show the allegations with reference to the offenses charged.

According to the petitions for removal, these Respondents are charged with the following offenses: Assault and battery (R. 36), interfering with an officer in the performance of his duty (R. 47), profanity and use of vulgar language (Mississippi Code section 2089.5) (R. 48), reckless driving (R. 49), disturbing the peace in violation of Section 2089.5, Mississippi Code of 1942 (R. 50), interfering with a police officer in the performance of his duty (R. 51), operating a motor vehicle with improper license tags in violation of sections 9352-24 and 9352-51, Mississippi statute 1942, (R. 52), contributing to the delinquency of a minor in violation of section 7185-13, Mississippi Code of 1942 (R. 53), parading without a

permit in violation of an ordinance of the City of Greenwood enacted June 21, 1963 (R. 54), disturbing the peace in violation of section 2089.5, Mississippi Code of 1942 (R. 55), operating a motor vehicle with improper license tags in violation of Sections 9352-24 and 9352-51, Mississippi Statute 1942 (R. 56), profanity in violation of Mississippi Code Section 2291 (R. 57), disturbance of the public peace or the peace of others in violation of Mississippi Code section 2089.5 (R. 58), assault (R. 59), "inciting to riot, believed to be Mississippi Statute number 8576" (R. 60), disturbance in a public place (R. 61), disturbance in a public place (R. 62), assault and battery (R. 63).

Section 8576 does not define any offense of "inciting to riot" and the District Court was unable to find any Mississippi statute relating to "inciting to riot." (R. 89)

Petitioner filed motions to remand all of these cases, which motions are shown by the agreement at R. 100 to be identical except for the names of the defendants, the docket numbers, the names of the attorneys on whom service was made, and the date. One of the motions is printed at R. 64 and the ground thereof is that the cause was removed improvidently and is not a case within 28 USC section 1443.

The petitions for removal in the Weathers cases (R. 36) with respect to 28 USC Section 1443(1) alleged in substance that they are engaged in a project sponsored by the Council of Federated Organizations (COFO) to integrate the State of Mississippi; that this project has been criticized and opposed by practically all persons in the Executive Branch of the government of Mississippi, the entire Constabulary of Mississippi, and the Press; that Respondents are not guilty of the charges placed against them; that they were arrested and imprisoned by law enforcement officers of the City of Greenwood and Leflore County; that the arrests and prosecutions of Respondents

are for the purpose of harassing and punishing them and deterring them from protesting racial discrimination and segregation; that among legislative enactments evidencing Mississippi's policy to enforce racial discrimination and segregation is Mississippi statute "Section 4065 (3), which purports to prohibit the executive officers of the State from obeying the desegregation decisions of the United States Supreme Court" (Note: This statute is expressly limited to the executive branch of the state government and, even as to it, the requirement is that it prohibits integration "by any lawful, peaceful and constitutional means") and several otherwise unspecified statutes enacted by the 1964 Mississippi Legislature "which purport to prohibit picketing of public buildings, congregating and refusing to disperse; printing or circulating material which interfere with the operation of a business establishment; printing or circulating material which advocates social equality; the disturbing of the peace of others; giving false statements of complaints to Federal officials; obstructing public streets; encouraging others to remain on private premises of another when forbidden to do so; and statutes which purport to authorize officials to restrain the movements of groups and individuals and to impose curfews; authorize an increase in the State Highway Patrol from 274 to 475 men and give the Governor power to dispatch the Highway Patrol into areas on his own initiative; authorize an increase of the maximum penalty for violating a city ordinance from 30 to 90 days imprisonment and a fine of $300.00; authorize communities to pool their police forces and equipment". Respondents further allege that they are being denied and cannot enforce in the courts of Mississippi the rights guaranteed and secured to them under the federal constitution and laws providing for the equal rights of all citizents because the courts and law enforcement officers of Mississippi are hostile to and prejudiced against petitioners and because under Mississippi law, custom and prac-

tice court rooms are segregated and Negro witnesses and attorneys are addressed in court by their first names, because the courts of Mississippi are closed to competent out of state attorneys of Respondents' choice, because Mississippi municipal and county and other judges and prosecuting attorneys are either appointed by persons who are elected or are themselves elected in elections in which Negroes have been systematically denied the right to vote by reason of race, and because Negroes are excluded because of their race from the Mississippi election process and are therefore excluded from juries in the county where Respondents' cases are pending.

The petition alleges with respect to 28 U. S. C. A. Section 1443(2) that the "aforesaid conduct" of Respondents was engaged in by them under color of authority derived from the Federal Constitution and laws providing for equal rights of American citizens, and the state court prosecution of Respondents results from their refusal to desist from such conduct.

The District Court entered five memorandum opinions and orders remanding these cases to the Police Court of the City of Greenwood.

In its first opinion (R. 70) the Court stated that in none of the cases have the affidavits upon which the state prosecutions are based been made a part of the record, but that it is not disputed that the offenses are limited to violations of statutes or ordinances which are not discriminatory on their faces; and that the Respondents have not shown that any state statutory or constitutional provisions are discriminatory on their faces so as to deprive them of their equal civil rights on trial of these charges in state court. The opinion of the District Court in City of Clarksdale, Mississippi. vs. Gertge was attached to this opinion as a part thereof (R. 72).

In its second opinion and order (R. 89) the District Court stated that contrary to its rules, the Respondent

had not furnished the Court with a copy of the affidavit upon which the state prosecution is based or an explanation for the failure to obtain such copy and that the Court is prevented from knowing precisely with what offense the defendant is charged, and that the Respondent has not pointed to any state constitutional or statutory provision which is discriminatory on its face so that it can be found that defendant will be deprived of his equal civil rights on trial in the state court and that a search by the Court of the statutes relating to the offense of inciting to riot has produced no such discriminatory statute.

In the third opinion and order (R. 92) the District Court stated that Respondents had not complied with the rules of the Court by furnishing a copy of the affidavit upon which the state prosecution is based or an explanation of the reason for failure to file one, that the Respondents have failed to inform the Court of any state constitutional or statutory provision or municipal ordinance which is discriminatory on its face so as to deprive the Respondents of their equal civil rights on trial in the state court.

In the fourth opinion and order (R. 94) the Court states that the Respondent is charged with assault and battery under a city ordinance which cannot be said to be discriminatory upon its face and that an examination of all the papers in the record before the Court does not produce any statutory or constitutional provision of the State of Mississippi which would deprive defendant of her equal civil rights on the trial of this case.

In each opinion the District Court referred to its opinion in City of Clarksdale, Mississippi, v. Gertge, set out at page 72 of the record, as governing the case it was deciding.

SUMMARY OF ARGUMENT

Removal of a case from a State court to a Federal court may be had only as authorized by an act of Congress.

28 U. S. C. 1443(1) gives the right of removal only to a person "who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States"; and this denial or inability to enforce in the State court must appear from facts alleged by a verified petition filed before the trial of the cause in the State court.

Since Congress chose to limit the right of removal in such cases to those in which it could be demonstrated before trial that the petitioner would be denied or could not enforce his equal civil rights in the State court, this statute has long been interpreted by this and all other courts to restrict removal in such cases to those in which the petitioner can point to a statute or Constitutional provision of the State which will oblige the State court in following it to deny or keep petitioner from enforcing on the trial "a right under any law providing for the equal rights of citizens of the United States", and to provide that when officers of the State undertake in advance of trial to deprive a defendant of his equal civil rights by arresting and charging him, it cannot be said that he is denied or cannot enforce his equal civil rights "in the courts of such states" because in such a case it is presumed the State court will redress the wrong.

The Respondents in the case at bar have shown no state statute, constitutional provision or ordinance which makes it an offense for them to exercise any right under any federal statute or constitutional provision providing for the equal civil rights of citizens of the United States or which denies or prevents their enforcing in the State court any right they may have under any law providing for the equal civil rights of citizens of the United States.

The most that is alleged in any removal petition herein are the allegations in the petitions in the Weathers cases that criminal charges were filed against those Respondents by city and county officers with the motive of deterring and harassing them in the exercise of their civil rights. The petitions in the Peacock cases do not even allege that much, but the Court of Appeals, by erroneously applying its notice type pleading doctrine to the petitions, drew the inference from the petitions that Respondents contended that the officers arrested and charged them to harass and impede them in the exercise of their civil rights.

Under both logic and the decisions of this Court, the alleged acts of the officers are not sufficient to demonstrate that Respondents are "denied or cannot enforce in the courts" of Mississippi any equal civil right they may have.

The petitions do not show any jurisdiction of these causes in the Federal courts under the removal statute, and the District Court was therefore correct in remanding them to the State court.

The change made by the Court of Appeals in the interpretation of 28 USC 1443(1) should not prevail because it is contrary to the wording of the statute, is contrary to the settled interpretation of the statute promulgated by this and all other courts, would overturn the interpretation of the statute with which Congress has acquiesced since 1879 by several times reenacting it without material change in its language, and by considering it in the Civil Rights Act of 1964 by providing appeals from remand orders entered under it but not changing the wording of the removal statute itself, and will place an insupportable burden upon the United States District Courts and municipalities in that it will enable all or almost all defendants in state criminal prosecutions, however minor, to remove the same to the District Court for a trial to examine into the motives of the officers, State grand juries, or others who brought the criminal charges.

ARGUMENT

1. None Of These Cases Are Removable To Federal Court Under 28 U. S. C. Section 1443(1)

The law has long been established that there is no common law right to remove an action from a State court to a Federal court, and removal may be had only as authorized by an act of Congress. 45 Am. Jur. Removal of Causes Section 3, and 1 Moores Federal Practice Section 0.60(9). As stated by this Court in Kentucky v. Powers, 201 U. S. 1, 50 L. Ed. 633:

> "The federal courts being created by written law and not by common law, the court must determine whether the removal of this cause was authorized by any statute of the United States."

Section 1443(1) gives the right of removal only to a person "who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States"; and this denial or inability to enforce in the state court must be shown by a verified petition filed before the trial of the cause in the state court. 28 USC 1446.

It is therefore obvious, and this Court has so held many times, that this statute does not authorize a removal where any right is denied by judicial action during or after the trial; and that as to such denials the remedy is in the revisory power of the higher courts of the state and ultimately of the Supreme Court of the United States.

Since Congress chose, and we think wisely so, to limit the right of removal in such cases to those in which it could be demonstrated before trial that the petitioner would be denied or could not enforce his equal civil rights in the state courts, it appears that (a) the statute restricts removal in such cases to those in which petitioner can point to a statute or constitutional provision of the State

which will obligate the state court to deny or keep him from enforcing on the trial "a right under any law providing for the equal rights of citizens of the United States," and (b) that when officers of the State undertake to deprive a defendant of his equal civil rights, it cannot be said that he is denied or cannot enforce his equal civil right "in the courts of such states" because in such a case it is presumed the State court will redress the wrong.

In any event, this Court and the lower Federal Courts have uniformly so interpreted this statute many times with the result that for approximately 100 years preceding the decision of the Court of Appeals for the Fifth Circuit in the case at bar, this has been the settled law. And, during this period of approximately a century, Congress by failing to amend the statute has evidenced its satisfaction with this interpretation of it. Although Congress in enacting the Civil Rights Act of 1964 had occasion to examine this particular removal statute and did in fact amend 28 USC 1447 so as to provide that remand orders under 28 USC 1443 could be reviewable on appeal, they made no alteration whatsoever in the form of the removal statute itself.

In no petition to remove in this case has any Respondent pointed to any constitutional or statutory provision of Mississippi or any municipal ordinance which obligates the State Court on the trial to deny or prevent a Respondent from enforcing any "right under any law providing for the equal civil rights of citizens of the United States"; and the Federal Courts cannot presume that the State courts of Mississippi will deny any of the Respondents their equal civil rights.

The most that is alleged in any removal petition herein is that in the Weathers cases criminal charges were filed against those Respondents by City and County officers with the motive of deterring and harassing those Respond-

ents in the exercise of their civil rights. The Peacock petition does not even allege that much, although the Court of Appeals said with reference to it:

> "It is a fair inference that they contend that the statute is being invoked discriminatorily to harass and impede appellants in their efforts to assist Negroes in registering to vote."

Under both logic and the settled law established by the decisions of this Court, this is not sufficient to demonstrate that Respondents are "denied or cannot enforce in the Courts of such State a right under any law providing for the equal civil rights of citizens of the United States." The motives of the officers or other persons bringing the charges may be bad, but that does not show either the Respondents' guilt or innocence of the charge against them, does not show that the trial court will not find them not guilty if they are in fact not guilty, and does not show that they will be "denied or cannot enforce in the courts of such State" a right under a law providing for equal civil rights.

The wisdom of Congress in so limiting the removal of state criminal prosecutions to the Federal Courts is shown by a consideration of the fact that under the interpretation of the statute given it by the Court of Appeals for the Fifth Circuit in the case at bar, any defendant in a state criminal prosecution and numerous defendants in state civil suits can remove the same to Federal Court by simply alleging or showing that the charge or suit against them was instituted with the motive of deterring them in the exercise of some equal civil right and by then alleging as a conclusion that they will be denied or cannot enforce some equal civil right in the state court. The burden upon the Federal courts is obvious. The burden upon municipalities, counties, and some states will be insupportable in that they cannot bear the expense of transporting their witnesses and trying all of their crim-

inal prosecutions in Federal court. Under the holding of the Court of Appeals in the case at bar, in each such case the municipality or State would be put to the expense of a trial in Federal court to examine into the motives of the officers or others who brought the charges. If it was then determined that the motives of the persons who brought the charge were to deter or harass the defendant in the exercise of some equal civil right, the case would not be remanded and there would then be a second trial in Federal court to determine the guilt or innocence of the defendant of the charge pending against him. This would make a shambles of the court systems of this county, and it is impossible to believe that Congress in enacting the removal statute had any such intent.

The members of this Court who first interpreted this removal statute were much closer to the problems of the Reconstruction Period following the Civil War and to the motives impelling Congress to enact this statute than we are. As will be shown hereafter in this brief, those Courts stated it was clear at that time that state laws would be and were enacted to perpetuate the distinctions that had theretofore existed between the white and Negro races, such as the State laws actually enacted to exclude Negroes from juries and from being witnesses in Court. It is logical that Congress should seek by this removal statute to protect Negroes against these State statutes and constitutional provisions which could be shown in advance of trial would result in Negroes being denied in the State courts their rights under laws providing for the equal civil rights of citizens.

In our opinion the best possible argument that we can make in this case is to cite the decisions and quote the language of this Court in Strauder vs. West Virginia, 100 US. 303, 25 L. Ed. 664 (1880); Virginia vs. Rives, 100 U. S. 313, 25 L. Ed. 667(1880); Neal vs. Delaware, 103 U. S. 370, 26 L. Ed. 567 (1881); Bush vs. Kentucky, 107

U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354 (1883); Gibson vs. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075 (1896); Smith vs. Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082 (1896); Murray vs. Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87 (1896); and Kentucky vs. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633 (1906).

In Strauder vs. West Virginia, supra, this Court held that, since a state statute restricted juries to white men, a Negro accused of a crime could remove his case to Federal court because he was denied the equal protection of the law by this state statute.

It is interesting to note the statements of this Court in that case that at the time of the adoption of the Fourteenth Amendment it was clear "that state laws might be enacted or enforced to perpetuate the distinctions that had before existed" between the white and Negro races and that "it was well known that, in some states, laws making such discriminations then existed and others might well be expected." This makes it obvious why Congress when enacting the removal statute now appearing as 28 USC 1443 though it necessary to protect Negroes against state constitutional and statutory provisions that would cause the State court to deny them some right they possessed under a law providing for equal civil rights.

Virginia vs. Rives (also reported as ex parte Virginia), supra, was decided the same day as was the Strauder case. In that case two Negroes indicted for murder in state court sought to remove the case to Federal court on allegation that there were no Negroes on the grand jury which indicted them and none on the venire summoned to try them, that no Negroes had ever been allowed to serve as jurors in the county in any case in which a Negro was interested, and that strong prejudice existed against them based solely on their race and the fact that they were accused of murdering a white man. This Court

held that, since no constitutional provision or law of Virginia denied to them any civil right or stood in the way of their enforcing the equal protection of the laws, the case could not be removed even though the state officer to whom was entrusted the selection of persons from whom jurors were drawn refused to select any colored persons as jurors.

We quote from the opinion in Rives as follows:

> "It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the State Court and transferred it to the Federal Court. Section 641 of the Revised Statutes provides for a removal 'When any civil suit or prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States,' etc. It declares that such a case may be removed before trial or final hearing." . . .
>
> "Section 641 was also intended for their protection against state action, and against that alone" . . .
>
> "Removal of cases from State Courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. But it is still a question whether the remedy of removal of cases from State Courts into the courts of the United States, given by section 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not. The constitutional Amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not

after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly, until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals.

It is obvious, therefore, that to such a case, that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced, section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the State and ultimately to the review of this court." . . .

"It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to

them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments, he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to move his case. By the express requirement of the statute, his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial.

The petition of the two colored men for the removal of their case into the Federal Court does not appear to have made any case for removal, if we are correct in our reading of the Act of Congress. It did not assert, nor is it claimed now, that the Constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws." . . .

"It is to be observed that Act gives the right of removal only to a person 'who is denied, or cannot enforce, in the judicial tribunals of the State his equal civil rights'. And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions

of section 641. But when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

In Neal vs. Delaware, supra, a Negro named Neal, while awaiting trial in a State court of Delaware on a charge of rape, sought to remove the case to Federal court on the ground that the grand jurors who indicted him and the petit jurors summoned to try his case were of the white race exclusively, that all Negroes had been excluded from the list of jurors because of their race, and that in fact Negroes, although otherwise qualified have always in the county and state in which he was to be tried been excluded from jury service because of their color.

The State court denied the removal petition, and Neal was tried and convicted. On writ of error this Court reversed the conviction on account of the failure of the trial court to sustain Neal's motions to quash the indictment and the panel of jurors. It appeared that Negroes were excluded from the jury, and it was conceded that they have always been excluded from juries in the courts of Delaware. Although there was on the trial of this case in the State court such denial of the equal civil rights of Neal as to cause this Court to reverse his conviction, yet this Court held that the case was not removable from State court to Federal court because the discrimination complained of did not result from the Constitution or laws of the State of Delaware as expounded by its highest judicial tribunal.

The Court referred to Strauder vs. West Virginia, Virginia vs. Rives, and Ex Parte Virginia, 100 U. S. 339, and stated that they had ruled that the 14th Amendment was broader than the provisions of the removal statute, section 641. The Court then stated:

> "But it was also ruled, in the cases cited, that the Constitutional amendment was broader than the provisions of Section 641 of the revised statutes; that since that section only authorized the removal before trial, it did not embrace the case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the state, and ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers is, primarily, if not exclusively, the denial of such rights,

or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the state, excluded colored citizens from juries because of their race.

"The essential question, therefore, is whether at the time the petition for removal was filed, citizens of the African race, otherwise qualified, were, by reason of the Constitution and laws of Delaware, excluded from service on juries because of their color."

". . . The discrimination complained of does not result from the Constitution or laws of the State, as expounded by its highest judicial tribunal; and, consequently, it could not be made manifest until after the trial commenced in the State Court. The prosecution against the plaintiff in error was not, therefore, removable into the Circuit Court, under section 641. In thus construing the statute we do not withhold, from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the state, his constiutional equality of civil rights, all opportunity of appealing to the Courts of the Union for the redress of his wrongs. For, if not entitled, under the statute, to the removal of the suit of prosecution, he may, when denied at the trial in the State Court, or in the execution of its judgment, any right, privilege or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review. What we have said leads to the conclusion that the State Court did not err in disregarding the petition for removal."

In this case there was actual discrimination as to jurors as had always been the case in Delaware, but this Court held that, since this discrimination did not result from a constitutional or statutory provision of Delaware, the

case was not removable because it could not be made manifest until after the trial began and the court overruled the motions to quash that Neal would be denied or could not enforce in State court his equal rights.

In Bush vs. Kentucky, supra, the facts were that after a reversal of his first conviction for murder, Bush, a Negro, was indicted a second time and while awaiting trial in a Kentucky State court for murder he filed a petition to remove the case to Federal court. This petition was denied. Notwithstanding the adoption of the Fourteenth Amendment to the Federal Constitution, the Legislature of Kentucky twice thereafter expressly enacted laws excluding citizens of the African race from serving as jurors. Under these statutes all Negroes were excluded from the grand jury which returned the indictment against Bush. Thereafter and before the petit jury in this case was summoned the highest court of Kentucky declared these statutes to be unconstitutional.

The trial court overruled Bush's motions to set aside the indictment and the panel of petit jurors because of this exclusion of Negroes. Bush's conviction of murder was affirmed by the Court of Appeals for Kentucky. This Court in reviewing that decision reversed the conviction on the ground that the tSate court erred in not sustaining the motion to quash the indictment on the ground that Negroes had been excluded from the grand jury which returned it, but this Court specifically held that the State court was correct in denying Bush's petition to remove the case to Federal court. The basis for the decision was that since the Court of Appeals for Kentucky had, after the grand jury indictment but before the trial, declared the discriminatory statutes of Kentucky to be unconstitutional, it could not have been properly said in advance of the trial that the defendant in a criminal prosecution was denied or could not enforce in the judicial tribunals of Kentucky the rights secured to him by any law provid-

ing for the equal civil rights of citizens of the United States. This Court said:

> "The Court of Appeals of Kentucky in Commonwealth vs. Johnson, 78 Kentucky 511, decided June 29, 1880, and hereafter more fully referred to, had declared that the statutes of Kentucky excluding citizens of African descent from grand and petit juries because of their race or color, was unconstitutional, and that thereafter all officers charged with the duty of selecting or summoning jurors must so act without regard to race or color. That decision was binding as well upon the inferior courts of Kentucky as upon all of its officers connected with the administration of justice. After that decision, so long as it was unmodified, it could not have been properly said in advance of a trial that the defendant in a criminal prosecution was denied or could not enforce, in the judicial tribunals of Kentucky, the rights secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within their jurisdiction. The last indictment was, consequently, not removable to the Federal Court for trial under section 641, at any time after the decision in Commonwealth vs. Johnson had been pronounced. This point was distinctly ruled in Neal vs. Delaware, 103 U. S. 392, and is substantially covered by the decision in Virginia vs. Rives, 100 U. S. 319. If any right, privilege, or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States, had been denied by a refusal of the State Court to set aside either that indictment or the panel of petit jurors, or by any erroneous ruling in the progress of the trial, his remedy would have been through the revisory power of the highest court of the State, and ultimately by that of this Court."

In Gibson vs. Mississippi, supra, Gibson, a Negro, was convicted of murder in a state court of Mississippi, and

his conviction was affirmed by the Supreme Court of Mississippi and then by this Court.

Before trial Gibson filed a verified petition to remove his case to Federal Court, alleging in substance that he is a Negro accused of killing a white man, that by reason of prejudice against him by the white officers charged with selecting the Grand Jury all negroes had been excluded from the Grand Jury which indicted him, although there were in the county 7,000 colored citizens competent for jury service and only 1500 white citizens so qualified; that there had not for a number of years been any colored man summoned for a grand jury and that by reason of the prejudice against him he could not secure a fair trial by an impartial petit jury because the law officers charged with the selection of the jurors purposely on account of their color excluded all colored men and selected all white men for jury service. Gibson prayed for permission to subpoena witnesses to prove the allegations of his petition, but the petitioin for removal was denied on its face without evidence. This Court held that the petition to remove was properly denied. We regret that space does not permit us to quote the entire opinion of this Court rendered through Mr. Justice Harlan.

This Court stated that it had previously decided that the 14th Amendment was broader than the provisions of the removal statute and that since the removal statute authorized the removal before trial it did not embrace cases in which a right was denied by judicial action during the trial, and that for such denials occurring during the trial the remedy lay in the revisory power of the higher state courts and this Court; and this Court stated:

> "We therefore held in Neal v. Delaware, 103 U. S. 370, 385, 386, that Congress had not authorized a removal of the prosecution from the state court where jury commissioners or other subordinate officers had, without authority derived from the Consti-

tution and laws of the state, excluded colored citizens from jury duties because of their race. In view of this decision it is clear that the accused in the present case was not entitled to have the case removed into the Circuit Court of the United States unless he was denied by the Constitution or laws of Mississippi some of the fundamental rights of life or liberty that were guaranteed to other citizens resident in that state".

This Court further stated:

"But when the Constitution and laws of a State as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of the rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the State Court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, for removing the prosecution into the Circuit Court of the United States in advance of a trial."

This Court referred to the allegations of the removal petition that although there were 7,000 negroes and 1500 white people eligible for jury duty, nevertheless, for a number of years no negro had been summoned for jury duty but all had been purposely excluded on account of their color. This court then said:

"It is clear, in view of what has already been said, that these facts, even if they had been proved and accepted, do not show that the rights of the accused were denied by the Constitution and laws of the State, and therefore did not authorize the removal of the prosecution from the State Court."

The Court further stated:

"We do not overlook, in this connection, the fact that the petition for the removal of the cause into the federal court alleged that the accused, by reason of the great prejudice against him on account of his

color, could not secure a fair and impartial trial in the county, and that he prayed an opportunity to subpoena witnesses to prove that fact. Such evidence, if it had been introduced, and however cogent, could not, as already shown, have entitled the accused to the removal sought; for the alleged existence of race prejudice interfering with a fair trial was not to be attributed to the Constitution or laws of the state. It was incumbent upon the state court to see to it that the accused had a fair and impartial trial, and to set aside any verdict of guilty based on prejudice or race."

In Smith vs. Mississippi, supra, Smith, a negro, while awaiting trial for murder in a state court of Mississippi, filed a petition to remove the prosecution to Federal Court, alleging among other things that the officers charged with selecting, listing and drawing the jury wilfully and intentionally excluded all colored men from the list of jurors and asking that these officers who drew the jury be subpoenaed so that he could prove these allegations by them. Both the application to offer proof and the petition to remove were denied. This Court held that the petition to remove was properly denied, stating:

"For the reason stated in the opinion of the Court in Gibson vs. Mississippi, just decided, it must be adjudged that the petition of the accused for the removal of the prosecution into the Circuit Court of the United States was properly denied. Neither the Constitution nor the laws of Mississippi, by their language reasonably interpreted or as interpreted by the highest court of the State, shows that the accused was denied or could not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, 'any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the United States.' U. S. Rev. Stat. section 641."

In Murray vs. Louisiana, supra, this Court held that a criminal prosecution against a Negro in a State Court of Louisiana on a charge of murdering a white man was not removable to Federal Court on allegations that the petitioner was a Negro accused of murdering a white man and that Negroes by reason of their race and color were excluded by the jury commissioners from serving on either the grand or petit jury. This Court said that it was sufficient to dispose of this contention to cite Neal vs. Delaware and Gibson vs. Mississippi, in which after careful consideration this Court had held that Congress did not authorize removals upon allegations that jury commissioners and others without authority from the Constitution and laws of the State excluded Negroes from the jury and that in the case of denials arising from judicial action after a trial commenced the remedy lay in the revisory power of the higher state courts and this Court.

In Kentucky vs. Powers, supra, the facts were that Powers, a Republican, was indicted and tried in the State Court of Kentucky for the murder of Goebel, who had been the Democratic candidate for governor and was at the time of his death contesting the right to that office of Taylor, the Republican candidate for governor. Powers was tried and convicted three times, and each conviction was reversed by the Court of Appeals of Kentucky. When the case came on for trial the fourth time, Powers tendered for filing a petition to remove the case to Federal Court. The State court refused to permit the petition to be filed. Thereafter, a partial transcript of the record was filed in the Federal Circuit Court which granted Powers' application for a writ of habeas corpus commanding that he be delivered to the Marshal of the Federal Court. On application of Kentucky this Court reversed the order awarding the writ of habeas corpus, set aside the order docketing the case in the United States Court, and ordered the custody of Powers and the prosecution remanded to the State Court.

The only real question in the case was whether the case was removable under Section 641 of the Revised Statutes. The removal petitions alleged in substance that there was intense feeling about the murder; that on each of his previous trials the Court officials had either excluded entirely or almost entirely from the jury panel all Republicans and had made up the jury panel almost entirely of Goebel Democrats; that on the third trial Powers' attorneys had asked the Court to admonish the Sheriff to summon an equal number of each political party, and, when this request was refused, had asked the Court to instruct the Sheriff to summon jurors as he came to them, regardless of political affiliation, which request was also refused by the trial court; that on each of his three appeals the Court of Appeals of Kentucky had held that under a statute of Kentucky they were precluded from reversing any case on account of any irregularity in the summoning or empaneling of the jury; and that Taylor, the Republican who was declared elected Governor over Goebels had given Powers a pardon for the alleged murder of Goebels, but the State Courts had refused to recognize this pardon. In addition to the allegations of the removal petition this Court pointed out that on the appeal to the Kentucky Court of Appeals from the third conviction of Powers a Judge of said Court of Appeals had expressly stated in the opinion that it was clear that the trial judge was of the opinion that it was not an offense against the 14th Amendment or a denial of the equal protection of the laws to the defendant to exclude Republicans from the jury solely because they were Republicans.

After reviewing the cases on the point, the Court stated:

> "The adjudged cases make it clear that whatever the nature of a civil suit or criminal proceeding in a state court, it cannot be removed into a Federal court unless warrant therefor be found in some act of Congress."

This Court then reviewed at length all of the prior decisions involving the construction of the removal statute, stating that the first in point of time was Ex Parte Wells, 3 Woods, 128, 132, Fed. Cas. No. 17,386 determined in the Circuit Court of the United States for the District of Louisiana, with Mr. Justice Bradley presiding. In the Wells case the accused sought to remove the prosecution to Federal court on the ground, among others, that such vindictive prejudice existed against them on the part of the lawmaking and law-administering authorities of the state that they would be denied their right as citizens in the state court as well as before any jury and that the state court and its officers had so manipulated the local law as to deprive the accused of an impartial jury. This Court then pointed out that in denying the right to remove, the Court in the Wells case stated and held:

> "It is only when some such hostile state legislation can be shown to exist, interfering with the parties right of defense, that he can have his cause removed to the federal court."

This Court next discussed Strauder vs. West Virginia, pointing out that the petition to remove in that case "set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the state."

This Court next discussed Virginia vs. Rives, quoting at length from the opinion in that case, including the language therein to the effect that when a statute of a state denies the defendant's right, or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair that the state court will be controlled by it in their decisions, and in such case a defendant may affirm on oath in advance of trial what is necessary for removal; but that when an officer of a state undertakes to deprive an accused of a right it can hardly be said that he is denied or cannot enforce his rights in the judicial tribunals of the state because in such a case it ought to be presumed

the State courts will redress the wrong. And further, that denials of equal rights by the action of judicial tribunals of the state are left to the revisory powers of the Supreme Court of the United States.

This Court then referred to the cases of Neal vs. Delaware, Bush vs. Kentucky, Gibson vs. Mississippi, and Smith v. Mississippi, and then stated with reference to them:

> "In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in section 641—'who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States'—did not give the right of removal, unless the Constitution or the laws of the state in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States."

This Court then quoted the following from its opinion in Gibson vs. Mississippi:

> "When the Constitution and laws of a state, as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the State Court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, for removing the prosecution into the Circuit Court of the United States in advance of a trial."

This Court, accepting as true all the allegations of fact in the removal petition that were distinct and unambiguous, stated:

"It is true that, looking alone at the petition for removal, the trials of the accused disclose such misconduct on the part of administrative officers connected with those trials as may well shock all who love justice and recognize the right of every human being, accused of crime, to be tried according to law."

. . .

"Taking, then, the facts to be as represented in the petition for removal, still the remedy of the accused was not to have prosecution removed in to the Federal Court, that court not being authorized to take cognizance of the case upon removal from the state court. It is not contended, as it could not be, that the Constitution and laws of Kentucky denied to the accused any right secured to him by the Constitution of the United States or by any act of Congress. Such being the case, it is impossible, in view of prior adjudications, to hold that this prosecution was removable into the Circuit Court of the United States by virtue of Section 641 of the revised statutes. Such a case as the one before us has not been provided for by any act of Congress; that is, a Circuit Court of the United States has not been authorized to take cognizance of a criminal prosecution commenced in a state court for an alleged crime against the state, where the Constitution and laws of such state do not permit discrimination against the accused in respect of such rights as are specified in the first clause of Section 641. This Court, while sustaining the subordinate courts of the United States in the exercise of such jurisdiction as has been lawfully conferred upon them, must see to it that they do not usurp authority not affirmatively given to them by acts of Congress. In Mansfield C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 Sup. Ct. Rep. 510, 511, we said that 'the rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power,

that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction,—first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' This principle has been again and again reaffirmed."

This construction of the removal statute settled the matter; and, as far as we can find, this same construction of the removal statute was given it without exception by the text-writers and by all other courts which considered it until the recent decision of the Court of Appeals for the Fifth Circuit in the case at bar.

Some of the cases so holding are Hull vs. Jackson County Circuit Court, CCA 6th Circuit, 138 F 2d 820; State of New Jersey vs. Weinberger, et al., D. C. New Jersey, 88 F. 2d 298; Rand vs. State of Arkansas, U. S. D. C. Arkansas, 191 Fed. Supp. 20; City of Birmingham, Alabama, vs. Crosskey, et al., U. S. D. C. Ala., 217 Fed. Supp. 947; State of Arkansas vs. Howard, U. S. D. C. Ark., 218 Fed. Supp. 626; State of North Carolina vs. Alston, et al., U. S. D. C. North Carolina, 227 Fed Supp. 887; Petition of George Hagewood, U.S.D.C. Michigan, 200 Fed. Supp. 140; Anderson vs. Tennessee, U.S.D.C. Tennessee, 228 Fed. Supp. 207; Alabama vs. Shine, U.S.D.C. Alabama, 238 Fed. Supp. 871, 45 Am. Jur. Removal Sec. 109; 76 C. J. S. Removal of Causes, Sec. 94; and the scholarly opinion of the U. S. District Court for Northern Mississippi in Clarksdale, Mississippi v. Gertge appearing at page 72 of the record herein.

For example in Hull vs. Jackson County Circuit Court, supra, the Court of Appeals for the 6th Circuit stated and held:

"The removal of a criminal prosecution or a civil case under the statute in question because of the denial of the civil right or the enforcement of such a right must arise out of the destruction of such right by the Constitution or statutory laws of the state wherein the action is pending. The statute does not justify federal interference where a party is deprived of any civil right by reason of discrimination or illegal acts of individuals or judicial or administrative officers. If the alleged wrongs are committed by officers or individuals the remedy is the prosecution of the case to the highest court of the state and then to the Supreme Court of the United States as the laws of the United States authorize."

And for another example, the Michigan Court in Petition of George Hagewood stated and held:

"Unless some substantive or procedural rule of state law, as distinguished from the action of officials in disregard of state law, deprives a defendant of equal civil rights, the removal statute does not authorize the transfer of a criminal case to the Federal Court. See 76 C. J. S., Removal of Causes, section 94."

"We have no difficulty in perceiving the reasons which cause Congress to place such limitations upon removal. It is a fair presumption that a State Trial Court would adhere to the laws of the State. If such laws comport with the Constitutional guarantees of equal civil rights, there is no practical reason for the federal court to displace local judicial processes. On the other hand, if the state law itself would deprive a defendant of equal civil rights, the local court's fidelity to state law serves as reason to remove the trial of the cause to federal court."

2. Discussion Of the Opinions Of the Court Of Appeals In Rachel Et Al. vs. Georgia And Peacock Et Al. vs. City Of Greenwood

We submit that the decisions of the Court of Appeals for the Fifth Circuit in Rachel et al, vs. Georgia, 342 Fed. 2d 336, and in the case at bar, namely, Willie Peacock, et al, vs. the City of Greenwood, Mississippi, 347 F. 2d 679, are completely at variance with the decisions of this Court hereinabove cited and with those of all other courts which have passed upon the question.

We are forced to discuss the Rachel case because the Court of Appeals decided the case at bar on the Rachel case, stating "the City of Greenwood is foreclosed by the reach of Rachel vs. State of Georgia supra".

In the Rachel case the facts were that the appellants were indicted in a Georgia court for violation of the Georgia anti-trespess statute which is not discriminatory upon its face. They filed a petition for removal in United States District Court which remanded the cases to the State Court without hearing any testimony. On appeal from this remand order the Court of Appeals reversed and remanded the case with instructions to the District Court to ascertain whether the appellants were entitled to remove under Section 1 of 28 USCA 1443 by giving appellants "an opportunity to prove the allegations in the removal petition as to the purpose for the arrest and prosecutions, and in the event it is established that the removal of the appellants from the various places of public accomodation was done for racial reasons, then under authority of the Hamm case it would become the duty of the District Court to order a dismissal of the prosecutions without further proceedings." (P. 343 of 342 F. 2d)

The removal petition appears to have alleged that each of the appellants was arrested while seeking food or accomodations at a restaurant or hotel; that they were then

indicted and are awaiting trial; that removal is sought to protect the rights of the appellants under the Constitution and because they are being prosecuted for acts done under color of authority derived from the Constitution. The petition then has a conclusionary allegation that they are denied and/or cannot enforce in the State Courts their rights under the Constitution and laws of the United States because, among other things, Georgia by statute, custom, usage and practice supports and maintains a policy of racial discrimination.

Under the decisions of this Court hereinabove cited, the District Judge was obviously correct in remanding these cases to the State Court on the face of the petition. The petition did not allege and the Court of Appeals did not point to any Constitutional provision or statute of the State of Georgia to demonstrate that the appellants would be "denied or cannot enforce in the courts of such State" their rights under any law providing for the equal civil rights of citizens. Under the decisions of this Court, the burden was upon the appellants, as it should be, to demonstrate in their petition that they would be denied or could not enforce in the Georgia "courts" some equal civil right by pointing to a Georgia Constitutional provision or statute that would have such effect. Since they failed to do this, under settled law the District Court was required to remand the case to the State court.

Strangely enough, although the burden was upon the appellants to show their right to removal on account of such Constitutional provision or statute and although the burden was not upon Georgia to show that the appellants would not be denied and could enforce in the Georgia courts their rights under any law providing for the equal rights of citizens, nevertheless, the Court of Appeals which reversed the District Court disclosed and proved in one of its opinions that the appellants would not be denied and could enforce in the courts of Georgia the equal civil

right claimed by them. The removal petitions had alleged that the arrests were made while the appellants were seeking food or accommodations at a restaurant or hotel. After the arrests and indictment of appellants but before trial in state court, this Court rendered its decision in Hamm vs. City of Rockhill, 379 U. S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 to the effect that since Congress by the Civil Rights Act of 1964 has declared our public policy to be to prohibit discrimination in public accomodations, there is no public interest to be served in the further prosecution of those who by certain acts violated an anti-trespass statute prior to the enactment of the Civil Rights Act of 1964. In his partly concurring opinion in the Court below, Judge Bell pointed out that the Supreme Court of Georgia in the case of Bolton et al vs. State of Georgia, 140 S. E. 2d 866, had applied the Hamm case to a group of sit-in convictions with the result of abating the convictions and dismissing the cases (p. 345 of 342 F. 2d) Under these circumstances we do not see how it is possible to hold that the appellants have demonstrated that they will be "denied or cannot enforce in the courts" of Georgia the equal civil rights claimed by them. There was no allegation of fact, as distinguished from conclusions, to show appellants' alleged inability to enforce their equal civil rights in State court, and in addition the above decision of the Supreme Court of Georgia showed affirmatively that they could enforce such equal civil right in the courts of Georgia.

With deference, it appears to us that the Court of Appeals confused the Civil Rights Act of 1964 with the removal statute (Sec. 1443), and it clearly appears from the opinions in the Rachel case that the Court of Appeals was under the impression that the arrests and indictments against appellants, if forbidden by the Civil Rights Act or for an improper purpose, were sufficient to demonstrate that the appellants would be denied or could not enforce "in the courts" of Georgia their equal civil rights.

We submit that, under both logic and the decisions of this Court hereinbefore cited, the making of arrests and returning of indictments and other acts of State officers are utterly insufficient to meet the burden of the removal statute that the person seeking the removal show in advance of trial that he is denied or cannot enforce "in the courts of such State" some right under a law providing for the equal rights of citizens.

With sincere deference, we submit that the Court of Appeals overlooked the fact that under the removal statute the denial or inability to enforce must be "in the courts of such State", and that their holding was obviously based on a belief that the mere prosecution was sufficient to justify a removal.

For example, the Court stated at page 340 of 342 F. R. 2d, the following:

> "We conclude, therefore, that this petition for removal adequately alleged that the appellants suffered a denial of equal civil rights by virtue of the statute under which they were being prosecuted in the State Court. Unless there is patently no substance in this allegation, a good claim for removal under § 1443(1) has been stated."

And again, on page 341, the Court below emphasized the allegation of the petition that the arrests of appellants was for an improper purpose.

And again, at page 342, the Court below stated:

> "Because of the Civil Rights Act of 1964, Title II, and its recent interpretation by the Supreme Court, we hold that the allegations of these petitions are sufficient to invoke federal jurisdiction under 28 U. S. C. A. sec. 1443(1)."

Here again, it appears to us the Court of Appeals overlooked the fact that the outlawing of prosecutions for

sit-ins by the Civil Rights Act and this Court could in no way give the Federal Court removal jurisdiction under Section 1443 on the ground that the person arrested was denied or could not enforce his rights "in the courts of such state."

And again at page 343, the Court of Appeals stated:

> "Under the allegations of the petitions in the present case, these appellants have been denied, because of State legislation, 'a right under * * * (a) law providing for the equal civil rights of citizens of the United States.' They are entitled to a federal forum as provided for in 28 U. S. C. A. Sec. 1443(1) in which to prove these allegations. If the allegations are proved, then the federal court acquires jurisdiction for all purposes."

With deference, we submit that here again the Court of Appeals is overlooking the requirement of the removal statute that the denial or inability to enforce be "in the courts of such State", and appears to be holding that the arrest and institution of charges is sufficient to justify the removal. These cases had not been tried in the State Court and therefore how is it possible to say that the appellants had been or will be "denied, because of State legislation, a right under a law providing for the equal rights of citizens of the United States" without, as did the Court in the above statement, leaving out the statutory requirement that the denial be "in the courts of such State.

And then again, on page 343, the Court below stated that "upon remand, therefore, the trial court should give appellants an opportunity to prove the allegations in the removal petition as to the purpose for the arrests and prosecutions," although under the settled decisions of this Court the purpose for the arrests and prosecutions, however improper, will not justify a removal because they do

not show that on the trial the defendants will be denied or unable to enforce their rights "in the courts". The presumption, as stated many times by this Court in the cases hereinbefore cited, is that the State court on the trial will redress any wrong in the arrest or indictment.

In his partially concurring opinion in the Rachel case, Judge Bell also states that on account of the arrests and indictments, coupled with this Court's interpretation in Hamm of the Civil Rights Act of 1964, the removal petitions may be considered to allege that appellants are unable to enforce in the Georgia courts their rights under the Civil Rights Act because, as he says: "The fact is that appellants were being prosecuted under such a statute, viz., Ga. Code Sec. 26-3005."

Again, with the utmost deference, we submit the holding in the Rachel case that the arrest and prosecution are sufficient to show a denial or inability to enforce an equal civil right "in the courts of such State" and therefore to give the right of removal under Section 1443 is contrary to logic and to all of the decisions of this Court on the subject; and, in addition, it is a doctrine which, if it prevails, will destroy the lines of demarcation between the jurisdiction of Federal and State Courts because under its doctrine, including its "bare bones allegation" doctrine of conferring removal jurisdiction on Federal Courts, we believe all or at least a majority of all criminal cases hereafter filed in state courts can be removed to Federal Court for at least one lengthy expensive hearing in Federal Court to examine into "the purpose for the arrests and prosecutions".

We find confusing the fact that in the Rachel case the Court at page 339 of 342 F. 2d, appears to be disclaiming any intention of deciding that a case is removable where no legislative denial of rights is shown, whereas the same Court in the Peacock case by holding that Rachel is

decisive of Peacock (a case in which there is no legislative denial of rights) is apparently saying that it did in Rachel decide a case was removable even though no legislative denial of rights is shown.

In any event, if it should be held that in the Rachel case there was a Georgia statute which would deny or prevent the defendants from enforcing in the courts of Georgia a right under any law providing for the equal civil rights of citizens of the United States or which was contrary to any federal law with reference to the equal civil rights of citizens, then the Court of Appeals erred in holding that Peacock was controlled by Rachel because no such statute is present in Peacock. The Respondents in the case at bar have shown no state statute, constitutional provision or ordinance which makes it an offense for them to exercise any right under any Federal statute or constitutional provision providing for the equal civil rights of citizens of the United States, and the Respondents in the case at bar have shown no Mississippi statute, ordinance or constitutional provision which denies or prevents their enforcing in the courts of Mississippi any right under any law providing for the equal civil rights of citizens of the United States. None of the statutes or ordinances alleged in any of the petitions for removal are unconstitutional or invalid on their face under the equal protection clause of the Fourteenth Amendment or under any Federal statute providing for equal civil rights; and we cannot understand how it is possible to hold that, if a policeman under a statute not discriminatory on its face makes an improper arrest of a person exercising some right under a law providing for equal civil rights, it is thereby demonstrated in advance of trial that the arrested person is "denied or cannot enforce in the courts of such State" a right under a law providing for equal civil rights.

In the case at bar (Peacock), the removal petition (R. 3) did not allege any facts with reference to Respondent's arrest for obstructing public streets or even state where and what Respondent was doing at the time of the arrest and did not allege any constitutional provision or statute of Mississippi which will result in Respondent being denied or unable to enforce an equal civil right "in the courts of such State", but it did allege that Respondent was arrested and is to be tried under a vague and unconstitutional statute that, by reason of his arrest and charge under it, is being applied as a part of the policy of racial segregation of Mississippi and the City of Greenwood. By applying the "bare bones allegation" doctrine of the Rachel case, the Court of Appeals decided that: "It is a fair inference that they (Respondents) contend that the statute is being invoked discriminatorily to harass and impede the appellants in their efforts to assist Negroes in registering to vote."

With the following words the Court of Appeals decided that the removal petition was sufficient to set forth a claim for removal under 28 U.S.C. 1443(1) and to require the District Court to have a hearing on the truth of its allegations:

> "The Rachel case disposes of the two questions under Sec. 1443(1) raised by this appeal: (1) whether the brief allegations of the removal petitions were sufficient as a matter of pleading to allege a cause for removal under Sec. 1443(1); and (2) whether Sec. 1443(1) allows removal where a state statute, though valid and non-discriminatory on its face, is applied in violation of some equal right of the accused."
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> * * * *
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> "From the Rachel decision and its application of the rules of federal notice type pleading to removal petitions, it is plain that the petitions here are adequate as a matter of pleading to set forth the conten-

tion that Mississippi Code Sec. 2296.5 is being applied so as to deny appellants their rights under the equal protection clause of the Fourteenth Amendment."

* * * *

"We therefore hold that a good claim for removal under Sec. 1443(1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination."

It is clear that in this case the Court of Appeals overlooked the requirement of the removal statute that the denial or inability to enforce the equal civil rights be "in the courts of such State" and, instead, held that the allegation of an arrest and prosecution for an improper purpose was sufficient to confer jurisdiction on the U. S. District Court under 28 U.S.C. 1443(1).

We know of no better way to point out what we believe to be the fallacy of this holding than to say:

(a) It obviously is not true that an arrest and prosecution by state officers for an improper purpose demonstrates in advance of trial that the State court will deny or prevent the defendant from enforcing in the State court a right under any law providing for the equal civil rights of citizens; and

(b) In any event this Court and all other courts considering the matter except the Court of Appeals for the Fifth Circuit have repeatedly and consistently over a period of many years held that an arrest or prosecution for an improper purpose does not demonstrate that the defendant will be denied or unable to enforce in the state court his equal civil rights and, therefore, does not authorize a removal of the case to Federal Court under the removal statute; and

(c) The law with reference to removal of such cases to Federal Court as set forth in 28 U.S.C. 1443(1) and as interpreted by this Court is a sound law while the law as pronounced by the Court of Appeals in Peacock is unsound in that it is contrary to the removal statute, will result in all or almost all defendants in state criminal prosecutions being able to move their cases to Federal Court, will greatly impair the authority of states, counties and municipalities to conduct criminal prosecutions, will clog the dockets of the Federal District Courts with vague and lengthy trials to first examine into the motives of arresting officers, state prosecuting attorneys and state grand juries and then, if the motive be found bad, with another trial to determine the guilt or innocence of the defendant, will cause a vast number of police court cases to be tried in U. S. District Courts, and will place on many, if not most, municipalities an expense for prosecuting any criminal case, no matter how minor, that will be prohibitive. If this Court is inclined to think we are exaggerating, it has only to consider the fact that the cases here removed to Federal Court by the Court of Appeals range from the use of vulgar language and reckless driving through assault and driving an automobile with an improper license tag.

3. The Application By the Court Of Appeals Of Notice Type Pleading To the Removal Petitions Herein

In Rachel the Court of Appeals cited its own decisions authorizing notice type pleadings under the Federal Rules of Civil Procedure, including its holding that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim" (P. 340 of 342 F. R. 2d), applied this rule to the removal petition in Rachel, and then applied the same rule to the re-

moval petition in Peacock by referring to its holding in Rachel. (P. 682 of 347 F. R. 2d)

The result of this is to relieve the person seeking removal from the usual burden of alleging facts in his removal petition sufficient to show that the Federal Court has jurisdiction of the cause.

28 U. S. C. 1446(a) requires the filing of "a verified petition containing a short and plain statement of the facts which entitle him or them to removal."

In Rives v. Virginia, supra, this Court quoted with approval the following language in Mansfield C. & L. M. R. Co. vs. Swan, 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 Sup. Ct. Rep. 510, 511:

> "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act."

In Colorado v. Symes, 286 U. S. 510, 52 S. Ct. 635, 76 L. Ed. 1258, wherein there was filed under 28 USC 76 a petition to remove a state criminal prosecution to Federal Court, this Court stated and held:

> "And it is axiomatic that the right of the states, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the Federal Government to exert exclusive and supreme power in the field that by virtue of the constitution belongs to it. The removal statute under consideration is to be construed with highest regard for such equality. Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state

courts for crimes against state law. Congress is not to be deemed to have intended the jurisdiction to try persons accused of violating the laws of the state should be wrested from its courts in the absence of a full disclosure of the facts constituting the grounds on which they claim protection under section 33." . . .

"The burden is upon him who claims the removal plainly to set forth by petition made, signed and unequivocally verified by himself all the facts relating to the occurrence, as he claims them to be, on which the accusation is based. Without such disclosure the court cannot determine whether he is entitled to the immunity." . . .

"As said by Chief Justice Taft speaking for the Court in Maryland vs. Soper, 270 U. S. 33, 70 L. Ed. 458, 46 S. Ct. 185, supra, 'it must appear that the prosecution . . . has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts of conduct of his, not justified by his federal duty . . . . He must establish fully and fairly this defense by the allegations of his petition for removal before the federal court can properly grant it. It is incumbent on him, conformably to the rules of good pleading, to make the case on which he relies so that the Court may be fully advised and the state may take issue on motion to remand.' "

We submit that this notice type pleading doctrine is not properly applicable to those allegations in a pleading which are required for the purpose of showing that the Federal court has jurisdiction of the case; and, in addition, this doctrine when so applied is harmful and burdensome in that it relieves the movant of the simple burden of plainly stating the facts showing jurisdiction at the expense of requiring the Federal court and the opposing party to have an evidentiary hearing to determine if

there are any possible facts which will confer jurisdiction on the Federal court.

4. The Effect Of the Failure Of Congress To Amend the Removal Statute After Its Interpretation By This Court

It is the general rule that where an ambiguous statute has been construed by the courts and this construction has become accepted and settled law, and Congress has not amended the statute so as to change the interpretation placed on it by the courts, the silence or inaction of Congress is taken as legislative approval of the judicial interpretation of the statute. 50 Am. Jur. Statutes, section 326; United States vs. Elgin, J. and E. R. Company, 298 U. S. 492, 80 L. Ed. 1300.

The weight accorded this rule of statutory construction would appear to increase with the period of time during which Congress has acquiesced or remained silent, the consistency with which the decision has been followed by the courts, and the contemporaneousness of the original opinion with the enactment of the statute; and the weight accorded the rule increases still further when Congress directed its attention to the statute involved, amending one portion but leaving the portion to be construed unamended. (Missouri vs. Ross, 299 U. S. 72, 81 L. Ed. 46; Reed vs. Steamship Yaka, 373 U. S. 410, 10 L. Ed. 2d 448, 83 S. Ct. 1349;

Where the question involves the construction of a statute, Congress can rectify the court's mistake, if such it was, at any time, and for that reason in these circumstances reversal of the construction is not readily to be made. United States v. South Buffalo Railroad Company, 333 U. S. 771, 68 S. Ct. 868, 92 L. Ed. 1077.

There is still another rule that Congress, by reenacting a statute without substantial change, adopts the previous

judicial construction of the statute. Flora vs. United States, 357 U. S. 63, 2 L. Ed. 2d 1165, 78 S. Ct. 1079.

As shown by the cases herein cited, the construction of the removal statute contended for by petitioner was given it by this Court soon after its adoption. This construction has been in effect since at least 1879, has been repeatedly followed by this Court and the numerous other courts which have considered the matter, and has been considered settled law for many years. During this long period of time, Congress has reenacted the statute without any change in the language that would affect the construction previously given it by this Court. And, as pointed out by the District Court in its opinion appearing at pages 80 and 81 of the record herein:

> "The several civil rights acts of the last few years, while considering in detail legislative solutions to the problems created by racial prejudice, have made no attempt to redefine the scope of 28 U. S. C. § 1443. Indeed, the framers of the Civil Rights Act of 1964, Pub. L. 88-352 (1964), had occasion to consider the removal statute in the amendments to 28 U. S. C. § 1447, providing that remand orders under 28 U. S. C. § 1443 should be reviewable on appeal, but in so doing they made no alteration whatsoever in the form of the removal statute itself."

CONCLUSION

We respectfully submit that this Court should reverse the decisions and judgments of the Court of Appeals in both the Peacock and the Weathers cases with directions to affirm the orders and judgments made in all of these cases by the United States District Court for the Northern District of Mississippi remanding them to the Police Court of the City of Greenwood, Mississippi.

Respectfully submitted,

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CERTIFICATE

The undersigned counsel of record for the petitioner and cross-respondent, The City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing brief of petitioner has been this day forwarded by United States air-mail, first-class postage prepaid, to Benjamin E. Smith and Jack Peebles, of the firm of Smith, Waltzer, Jones and Peebles, 1006 Baronne Building, New Orleans, Louisiana, attorneys of record for the respondents and cross-petitioners.

This the ..... day of March, 1966.

AUBREY H. BELL
OF BELL & MCBEE
115 Howard Street
Greenwood, Mississippi

APPENDIX I.

MISSISSIPPI CODE OF 1942, RECOMPILED:

SECTION 2089.5 DISTURBANCE OF THE PUBLIC PEACE, OR THE PEACE OF OTHERS.

1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine or not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect.

SECTION 2291. OBSCENITY—PROFANITY AND DRUNKENNESS.

If any person shall profanely swear or curse, or use vulgar and indecent language, or be drunk in any public place, in the presence of two or more persons, he shall, on conviction thereof, be fined not more than one hundred dollars.

SECTION 2296.5. OBSTRUCTING PUBLIC STREETS, ETC.—WILFUL OBSTRUCTION OF, OR INTERFERENCE WITH, USE OR PASSAGE.

1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of

any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

SECTION 7185-13. CONTRIBUTING TO THE NEGLECT OR DELINQUENCY OF A CHILD MADE A MISDEMEANOR.—Any parent, guardian or any other person who wilfully commits any act or omits the performance of any duty which act or omission contributes to or tends to contribute to the neglect or delinquency of a child as defined in this act, or who knowingly aids any child in escaping or absenting himself from the guardianship or custody of any person, agency or institution, or knowingly harbors or conceals, or aids in harboring or concealing, any child who has absented himself without permission from the guardianship or custody of any person, agency, or institution to which such child shall have been committed by the court, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed $500.00, or by imprisonment not to exceed six months in jail, or by both such fine and imprisonment. Nothing contained in this section shall prevent proceedings against such parent, guardian or other person under

any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor; provided that nothing in the provisions of this act shall preclude a father, mother or guardian of any child from having a right to trial by jury when charged with having violated the provisions of this section.

SECTION 8576. NATIONAL GUARD—HOW ORDERED OUT.

When the state is threatened with invasion, insurrection, flood, or other catastrophe, or when there exists a riot, mob, unlawful assembly, breach of the peace or resistance to the execution of the laws of the state, or imminent danger thereof, and if in the opinion of the governor, the civil authorities are unable to repel or suppress the same, or if the sheriff or judge or the circuit court of any county, call upon the governor for the aid of the troops, it shall be the duty of the governer to order out the Mississippi National Guard, or such part thereof as he may deem necessary for the purpose. Provided, that if the troops be ordered into any county in the aid of civil authorities at the request of the sheriff or the judge of the circuit court of said county, the governor shall be the sole judge of the number of troops to be ordered out on such service, and that the cost of such service shall be borne by the state.

Whenever any part of the military forces of this state is on active duty pursuant to the order of the governor, the commanding officer may order the closing of any place where intoxicating liquors, arms, ammunition, dynamite or other explosives are sold, and forbid the sale, barter, loan, or the giving away of any of these articles so long as any of the troops remain on duty in the vicinity where the place ordered closed may be located.

Before using military force in the dispersion of any riot, rout, tumult, mob or other lawless or unlawful as-

sembly, or combination mentioned in this chapter, it shall be the duty of the civil officer calling out such military force, or some other conservator of the peace, or if none be present, then of the officer in command of the troops, or some person by him deputed to command the persons composing such riotous, tumultous, or unlawful assemblage or mob, to disperse and retire peacefully to their respective abodes and businesses; but, in no case, shall it be necessary to use any set or particular form or words in ordering the dispersion of any riotous, tumultous or unlawful assembly; nor shall any such command be necessary where the officer or person, in order to give it, would necessarily be put in imminent danger of loss of life, or great bodily harm, or where such unlawful assembly or riot is engaged in the commission or perpetration of any forcible and atrocious felony, or in assaulting or attacking any civil officer, or person lawfully called to aid in the preservation of the peace, or is otherwise engaged in the actual violence to any person or property.

Any person, or persons, composing or taking part in any riot, rout, tumult, mob or lawless combination or assembly, mentioned in this chapter, who, after being duly commanded to disperse as hereinbefore provided in this section, wilfully and intentionally fail to do so, is guilty of a felony, and must on conviction be imprisoned in the penitentiary for not less than one, nor more than two, years.

Any person who unlawfully assaults or fires at, or throws any missile at, against, or upon any member or body of the militia or national guard, or civil officer, or other person lawfully aiding them, when assembling or assembled for the purpose of performing any duty under the provision of this section, must, on conviction, be imprisoned in the penitentiary for not less than two years, nor more than five years.

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SECTION 9852-21. PENALTY FO
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SECTION 9352-24. VEHICLES DEALERS—ENFORCEMENT OF ACT—DISPOSITION OF ASSESSED PENALTIES.

1. (a) Every dealer in or agent for vehicles, except motorcycles, as herein defined, shall, on or before November first of each year, or before commencing business, make an application to the Motor Vehicle Comptroller of the State of Mississippi for a dealer's permit, on forms prescribed and furnished by the motor vehicle comptroller, which forms shall include a statement that the dealer and/or agent for vehicles is actively engaged, or will be actively engaged, in selling vehicles to the public at the time the application is made, or immediately thereafter, and such application shall show his sales tax account number, and such other information as may be required upon the forms prescribed by the motor vehicle comptroller. The motor vehicle comptroller shall prescribe such forms as will enable him to determine whether, in fact, the applicant is a bona fide dealer in, or agent for, vehicles and make every reasonable effort to limit the issuance of dealer's tags to those actively engaged in the business.

The annual highway privilege tax for each dealer's license tag shall be fourteen dollars ($14.00), plus a registration or tag fee, and such tax shall be paid on or before the first day of November of each year except in the case of commencement of business after the first day of November, in which event application shall be made and the tax paid prior to the commencement of such business. The tax imposed by this section shall be prorated semi-annually and dealers commencing business between November first and May first of the following years shall be required to pay the full annual tax, and dealers commencing business after the first day of May of any year shall be required to pay one half (½) of the annual tax for the remainder of the year ending October thirty-first.

The payment of the annual tax of fourteen ($14.00) and the license tag fee shall entitled the dealer to the issuance of one license tag for use as herein provided, and such dealer shall be entitled to obtain additional license tags, not to exceed twelve (12) during any one year. However, upon good cause therefor being shown, the comptroller may, at his discretion, authorize and permit any dealer to purchase and obtain a greater number of additional tags than twelve (12) when same is necessary for proper conduct of dealer's business. For each such additional license tag, there shall be paid a tax of fifty ($50.00) plus the registration or tag fee and the tax for such additional tag shall be prorated as provided above. Every dealer in, or agent for, motorcycles exclusively shall make application for and obtain the dealer's license tag and permit as above provided, except that the annual tax on such a dealer shall be six dollars ($6.00) per year for each tag, plus the registration or tag fee. All other provisions of this section, including the provisions for additional tags, shall apply to such motorcycle dealers.

Dealer's license tags shall be fastened to and displayed only upon such vehicles as are actually being demonstrated for purposes of sale; for delivery of vehicles, by driveout method from factory, assembly plant or place of business to customer or other places of business of the dealer; and for the movement of vehicles from point to point when the vehicle is the property of the dealer as such. Provided that the privilege granted shall not be construed to mean that any dealer may use dealer's tags except for personal use or for hauling or transporting property or persons except in bona fide demonstrations.

If any dealer shall fail or refuse to pay the tax levied herein on or before the date on which the vehicle is operated on the streets or highways of this state, then such person shall be liable for the full amount of such tax plus a penalty thereon of one hundred per cent (100%).

(b) Every said dealer or agent shall make a monthly report to the comptroller on or before the twentieth day of each month, on all motor vehicles and/or trailers, whether new or used, coming into his possession during the previous month, and from whom obtained, showing name and post-office address. The report shall also show all motor vehicles and/or trailers sold by him during the month, to whom sold, and the name and address of the purchaser. The report shall further show all motor vehicles and trailers permanently dismantled by him, with the tag and motor number of same, together with those on hand on the last day of the month, giving description as herein provided.

In giving descriptions of the motor vehicles and/or trailers as herein required, the dealer or agent shall give the name, type, motor number and serial number of the passenger car; and, in addition, the tonnage of trucks and trailers, or truck-semitrailer units, and such other information as may be required by the comptroller, on forms prepared by said comptroller.

Dealer's tags shall only be used on vehicles owned by a dealer as such and for the purposes authorized by this section. As soon as a dealer shall sell or transfer a vehicle or motorcycle, he shall immediately remove therefrom the dealer's tag and the purchaser or transferee shall immediately comply with the provisions of the law with reference to obtaining license tags. Any person owning a vehicle or motorcycle bearing a dealer's tag when such person is not a dealer or when a dealer uses a dealer's tag for any purpose other than that authorized by this section then such person or dealer shall be deemed to be operating the vehicle in violation of the provisions of this act and shall be required to immediately obtain proper license and shall pay for such tag the full annual privilege license tax applicable, plus a penalty of one hundred per cent (100%).

If any person, firm, or corporation claiming to be a dealer, or any person acting for either of them, shall make any false answer to any part of the application required by this act, then the dealer shall forfeit his right to use dealers' tags.

Whenever a vehicle is found to be improperly operated with a dealer's tag, such dealer's tag shall be forfeited. If any dealer shall fail or refuse to file reports as required by this section for a period of sixty (60) days after such report is due, his dealer's tags shall be taken up and his permit shall be suspended until all such reports, then in arrears, are filed. For the second failure to file reports for a sixty-day period, the dealer's permit shall be revoked for the remainder of the current tag year but no part of the permit or tag fees shall be refunded.

All moneys collected by the motor vehicle comptroller as proceeds from the tax imposed by this act shall be distributed to the various counties of the state according to the provisions of section 64, chapter 266, laws of 1946, appearing as section 9352-64, Mississippi Code of 1942, Recompiled.

2. The motor vehicle comptroller, the commissioner of public safety, all sheriffs and tax collectors, county patrolmen and authorized municipal officers are hereby authorized and directed to enforce the provisions of this act. Any penalties assessed at the instance of any municipal officials shall be divided fifty per cent (50%) to the municipality which initiated the penalty and fifty per cent (50%) to the county in which such municipality is located. Sheriffs and tax collectors shall be entitled to their share of penalties as is elsewhere provided by law. Any penalties imposed at the instance of the officers of the commissioner of public safety, or the motor vehicle comptroller, shall be paid into the county where the violator was apprehended. Any violation of this act shall be promptly reported to the chairman of the state tax com-

mission, and he shall then determine and assess any sales or use taxes found to be due and cause said vehicle to placed upon the assessment rolls for ad valorem taxes.

AN ORDINANCE AMENDING THE TRAFFIC ORDINANCE OF THE CITY OF GREENWOOD ADOPTED NOVEMBER 20, 1953, RECORDED IN BOOK 39 AT PAGE 554 ET SEQ., OF THE MUNICIPAL MINUTES OF SAID CITY AND IN ORDINANCE RECORD 7 AT PAGES 257 ET SEQ., OF THE ORDINANCE BOOK OF SAID CITY BY AMENDING SECTION 76 OF ARTICLE IX THEREOF SO AS TO SET FORTH THE PURPOSES FOR WHICH STREETS AND SIDEWALKS ARE MAINTAINED BY THE CITY AND TO MAKE IT UNLAWFUL FOR ANY PERSON OR PERSONS WITH CERTAIN EXCEPTIONS TO PARADE OR MARCH OR TO SIT, KNEEL, OR RECLINE, OR TO ENGAGE IN PUBLIC SPEAKING, GROUP SHOUTING OR GROUP SINGING OR TO ASSEMBLE IN ORGANIZED GROUPS CARRYING SIGNS, ON THE SIDEWALKS OR STREETS OF THE CITY OF GREENWOOD, MISSISSIPPI, OR TO INTERFERE WITH THE NORMAL USE OF SIDEWALKS AND STREETS, WITHOUT WRITTEN PERMISSION OF THE CHIEF OF POLICE OF SAID CITY AND TO MAKE IT UNLAWFUL TO PLACE DEBRIS ON STREETS AND SIDEWALKS: AND PROVIDING THAT THIS ORDINANCE BE EFFECTIVE ON THE DATE OF ITS PASSAGE.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF GREENWOOD, LEFLORE COUNTY, MISSISSIPPI:

SECTION 1. That Section 76 of Article IX of the Ordinance styled "AN ORDINANCE REGULATING TRAFFIC UPON THE PUBLIC STREETS OF THE CITY OF GREENWOOD, MISSISSIPPI, AND REPEALING ALL OTHER ORDINANCES AND SECTIONS OF ORDINANCES IN CONFLICT HERE-

WITH" adopted November 20, 1953, and recorded in Book 39 at pages 554 et seq., of the Minutes of the Council of the City of Greenwood, Mississippi, and in Ordinance Record 7 at pages 257 et seq., of the Ordinance Book of said City, be and the same is hereby amended so as to be read as follows:

SEC. 76-A. PURPOSE OF STREETS AND SIDEWALKS.

The City of Greenwood, Mississippi, built and maintains its streets and sidewalks for the purpose of affording pedestrains comfortable, safe and convenient means of going from place to place in said City for the purpose of carrying out the normal, customary and usual pursuits of everyday life. Said City built and maintains the vehicular portions of its streets for the additional purpose of affording the public in general comfortable, safe and convenient means for transporting persons and property from place to place in said City, principally by vehicles, for the purpose of carrying out the normal, customary and usual pursuits of everyday life. Use of said sidewalks and streets by any person or persons for purposes other than those above set out interferes with the right of the public in general to use said sidewalks and streets for the purpose for which they were built and are maintained, and is therefore contrary to public convenience, is conducive to public disorder, is dangerous to public safety, and is calculated to cause breaches of the peace. Therefore, the provisions of this ordinance relative to the use of the sidewalks and streets in said City shall be construed most strongly against the person violating the same.

SEC. 76-B. CERTAIN USES OF STREETS AND SIDEWALKS ARE UNLAWFUL.

It shall be unlawful for any person or persons without the written permission of the Chief of Police of the City of Greenwood, Mississippi, to conduct or participate in

any parade or marching on the sidewalks or streets of the City of Greenwood, Mississippi, or to walk, ride, or stand in organized groups on said sidewalks or streets while carrying banners, placards, signs or the like, or to sit, kneel, or recline on the sidewalks or streets of said City, or to engage in public speaking, group shouting, group singing or any other similar distracting activity on any of the sidewalks or streets of said City, or to assemble in groups on any sidewalks or street in such numbers or manner as to block or interfere with the customary and normal use thereof by the public unless the persons so assembled in such groups are engaged in watching a march or parade authorized by the provisions hereof; provided, however, that no written permission of the Chief of Police of said City shall be required for a bona fide funeral procession enroute to a cemetery or for any parade or march by any unit of the Mississippi National Guard or the United States Army, Navy, Air Corps, or Marine Corps, or by personnel of the Police or Fire Department of said City of Greenwood, Mississippi.

SEC. 76-C. UNLAWFUL TO THROW OR PLACE CERTAIN ARTICLES AND DEBRIS ON SIDEWALKS OR STREETS.

It shall be unlawful for any person or persons to throw or place nails, tacks, bottles, rocks, bricks, paper, trash or other debris of any kind on any sidewalk or street of the City of Greenwood, Mississippi.

SECTION 2. In order to preserve the public safety, peace, concenience and order, it is necessary that this ordinance be effective immediately, and therefore by unanimous vote of all members of the City Council of Greenwood, Mississippi, it is ordered that this amendment to an ordinance shall take effect and be in force from and after the date of its passage.

Passed and approved this June 21, 1963.

REVISED STATUTES, TITLE XIII,
THE JUDICIARY, SEC. 641

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid; or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution, may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceeding in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed." (Note: No mention made here of remand orders, except upon failure to file copies of proceedings in circuit court, or of the right to appeal a remand order.)